UNITED STATES GOVERNMENT
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 13

STAFF SOURCE, LLC and
THE LEVY COMPANY,[1]

Employer

and **Case 13-RC-21456**

INTERNATIONAL UNION OF
OPERATING ENGINEERS,
LOCAL NO. 150, AFL-CIO[2]

Petitioner

DECISION AND ORDER

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing on this petition was held on March 3, 2006 before a hearing officer of the National Labor Relations Board, herein referred to as the Board.[3]

I. Issues

The Levy Company performs slag processing and other scrap metal services at the Mittal Steel Burns Harbor complex. On August 13, 2005, production and maintenance employees at The Levy Company went on strike. The Petitioner here, Local 150 of the International Union of Operating Engineers, already is the exclusive collective bargaining representative of those permanent employees of The Levy Company. In November 2005, Staff Source agreed to provide striker replacement employees to The Levy Company pursuant to a contract. The Petitioner now seeks to represent a bargaining unit comprised of a portion of those striker

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[1] The parties stipulated that, for purposes of this hearing, Staff Source, LLC and The Levy Company are joint employers of the employees in the petitioned-for unit, based upon their jointly determining the terms and conditions of employment for those employees.

[2] The names of the parties appear as stipulated to at the hearing.

[3] Upon the entire record in this proceeding, the undersigned finds:

a. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
b. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.
c. The labor organizations involved claim to represent certain employees of the Employer.
d. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Sections 2(6) and (7) of the Act.

replacement employees: all full-time and regular part-time employees of Staff Source working as loader operators for The Levy Company at Burns Harbor. This bargaining unit consists of approximately 10 of the 65 total employees that Staff Source is currently providing to The Levy Company as striker replacements.

The Employer contends that the petition is improper for three reasons. First, the Employer argues that the petition should be dismissed because the petitioned-for employees are temporary striker replacements who are not permitted to organize. Second, the Employer claims that, even if the temporary striker replacements were permitted to organize, the only appropriate unit is one that includes all 65 employees that Staff Source is currently providing to The Levy Company. Finally, the Employer argues that, if any unit of Staff Source employees is deemed eligible to participate in a representation election, then a self-determination election is the only proper one given that the Petitioner already represents permanent production and maintenance employees of The Levy Company. Because neither The Levy Company or Staff Source would consent to such an election, the Employer contends the petition should be dismissed.

The Petitioner argues that employees in the proposed bargaining unit are not temporary striker replacements but permanent employees; that the petitioned-for unit is appropriate given that loader operators do not share a community of interest with temporary employees in other job classifications at The Levy Company; and that a self-determination election is improper.

II. Decision

Given the specific factual circumstances presented in this case and pursuant to the Board's rationale in *Detroit Newspaper Agency*, 327 NLRB 871 (1999), I find that the Petitioner is precluded from seeking to represent a unit of temporary striker replacements at The Levy Company because the Petitioner is already the bargaining representative of the permanent production and maintenance employees who are on strike. Petitioner's attempt to represent both units of employees creates an insurmountable conflict of interest.

Accordingly, IT IS HEREBY ORDERED that the petition in this case is dismissed.

III. Statement of Facts

Staff Source was formed in 1998 to provide clients with three types of employees: temporary staff, temporary-to-permanent replacements, and permanent replacements. The company is headquartered in an office in Hammond, Indiana, and operates a second office in East Chicago, Indiana as needed. Milan Kesic is the President and Mirko Marich is the Vice President of Staff Source. Approximately 60 percent of the employees placed by Staff Source work in industrial positions, including 25 percent who work in heavy industrial jobs such as loader operator.

The Levy Company employs production and maintenance employees engaged in slag processing at the company's facility within the Mittal Steel Burns Harbor complex in Indiana. The Petitioner is the exclusive collective bargaining representative of these employees, including loader operators who fall in the job classification of Bulldozer-Loader-Grader pursuant to the parties' collective bargaining agreement. The last contract between the parties expired on March

31, 2005. The parties failed to bargain a successor agreement. Thereafter on June 6, 2005, The Levy Company declared the negotiations at an impasse and implemented terms and conditions for the permanent production and maintenance employees. On August 13, 2005, those employees went on strike, a walkout which continues today.

On November 15, 2005, Staff Source and The Levy Company entered into a Working Agreement pursuant to which Staff Source agreed to "recruit, screen, and assign qualified workers…to work at the Mittal, Burns Harbor site." The agreement specified five different job classifications to be filled: Laborer, Driver, Equipment Operator, Mechanic, and Working Supervisor. The agreement contains a "Payroll Transfer" provision stating:

> It is the intention of Staff Source to provide you with the type of workers you may desire to hire as permanent employees of The Levy Company and / or its affiliate companies. It is hereby understood that employees or applicants will remain employed by Staff Source for a period not less than 90 working days. Hiring prior to that time will result in The Levy Company being responsible for a finder's fee to Staff Source of [$3,500] for hiring during days 1 through 45, $2,000 for hiring days 45 through 90, no transfer fee after day 90.

On January 31, 2006, Staff Source and The Levy Company executed an Addendum to the Working Agreement. As described therein, the purpose of the Addendum was to revise the bill rate for drivers; add new bill rates for maintenance helper, lube person, pot hauler, crane operator, millwright, and plant operator; give Staff Source the ability to use a $150 sign-on bonus during recruitment of workers; and add reimbursement of housing and per diem expenses for out of town workers. The job classifications listed in the Addendum were in addition to the ones listed in the original Working Agreement.

Staff Source began supplying employees to The Levy Company pursuant to the agreements beginning in January 2006. These employees all fall within Staff Source's "temporary support staff" classification and now total roughly 65 employees.

Neither of the agreements contains a specific term or expiration date, but both contracts are terminable at will by either party. Staff Source's understanding of the agreement is that, if and when the strike concludes, Staff Source will no longer supply employees to The Levy Company. No employee placed by Staff Source at The Levy Company has been converted to permanent status as permitted by the Payroll Transfer provision of the Working Agreement. Most if not all of the placed employees have worked for The Levy Company for less than 90 days.

Employees who were hired by Staff Source to work at The Levy Company initially submitted a resume or standard Staff Source application to the company. Miguel Jemminez (sic), an Account Manager for Staff Source handling The Levy Company, pre-screened applicants. If Mr. Jimminez found them to have the requisite skills needed to work in one or more job classifications, he forwarded their applications to Vice President Marko Marich who

then interviewed the candidates. During those interviews, Mr. Marich informed the applicants that they would be doing "contract work" for The Levy Company and that employees there were on strike. At no point in any of the interviews did Mr. Marich inform applicants that they would be working permanently for The Levy Company. Timothy Ventrello, a striker replacement employee hired by Staff Source, testified that he was not promised permanent employment; he was told a strike was ongoing and a picket line was present; and he was afraid that he would lose his job at the end of the strike.

IV. Analysis

The Petitioner here seeks to represent a bargaining unit made up solely of replacement employees for strikers whom the Petitioner already represents. This scenario has not been directly addressed by the Board in any prior case. Nonetheless, the Board's standards for determining when employees are temporary and ineligible to vote, as well as its long-standing refusal to require an employer to bargain with a union on behalf of striker replacements provide the guidance as to whether the petition here is proper.

As a preliminary matter, the Employer argues that the petitioned-for employees are temporary striker replacements who are not permitted to organize under Board precedent. The Petitioner disputes the characterization of these workers as temporary.

The Board presumes that replacements for strikers are temporary employees in all cases. *O.E. Butterfield, Inc.*, 319 NLRB 1004 (1995). The burden is on the party asserting that the employees are permanent, here the Petitioner, to show a mutual understanding between the employer and the replacement employees that they are permanent. *Id*. An employee is "temporary" where the term of employment is finite; however, if the term is uncertain, the employee is eligible to vote. *Id*. A finite term of employment does not require that an employee's tenure expire on an exact calendar date. *St. Thomas-St. John Cable TV*, 309 NLRB 712, 713 (1992). Instead, the only necessary showing is that the prospect of the employee's termination from employment was sufficiently finite to remove any expectation of continued employment. *Id*.

Thus, the striker replacement employees in this case are presumed to be temporary employees, and that presumption is born out in the record evidence. Staff Source is providing workers within its "temporary support staff" classification to The Levy Company. Persons who interviewed with Staff Source for employment at The Levy Company were told that the employment was "contract work," that the facility at which they would work was involved in a labor dispute, and, on at least one occasion, that a picket line was present. Staff Source managers gave no assurances to applicants that their positions would be permanent. After being hired, no employee furnished by Staff Source has been converted to permanent status as permitted under the contract between Staff Source and The Levy Company. If and when the strike at Burns Harbor ends, Staff Source will cease providing workers to The Levy Company.

The Petitioner seeks to overcome the presumption of temporary status by simply relying on the terms of the contracts between Staff Source and The Levy Company. In particular, the Petitioner points to the Working Agreement's lack of use of the word "temporary" to describe

the employees being provided; the lack of an expiration date in either the Working Agreement or Addendum; and the inclusion of a clause in the Working Agreement giving The Levy Company the option to transfer employees to permanent status.

The relied-upon evidence fails to sustain the Union's burden. First, the parties' use or lack of use of "temporary" in the agreement cannot bestow on or remove from the employees the legal status of temporary employee; that status is contingent on the term of the employment being finite. Here, the employees are temporary because they are striker replacements who will no longer be working for The Levy Company after the strike ends. Their employment is for a finite period—from when they are hired to when the strike ends. Although no date certain exists for when the strike will end, a specific date is not required. Second, the lack of expiration date in the contract does not create an uncertain term of employment. The uncontroverted testimony from Mr. Marich at the hearing was that the contract was terminable at will and that, once the strike ended, The Levy Company would terminate the contract. Furthermore, a striker replacement employee testified that he was worried about the end of the strike because he would lose his job. Third, the mere fact that the agreement gives The Levy Company the authority to transfer employees from temporary to permanent status does not grant those employees permanent status. The Levy Company would have to exercise its authority to do so, which it has not done at any time. Thus, the petitioned-for unit here is made up of temporary striker replacements.

Having so found, the question here is whether temporary striker replacements can be represented by the same union that already represents the permanent employees. If the Petitioner is permitted to proceed with the petition and ultimately becomes the bargaining representative of the temporary striker replacements, a direct conflict of interest will permeate the Petitioner's representational activities for both bargaining units. Such a conflict of interest cannot be permitted.[4]

In an unfair labor practice setting, the Board has held that an employer does not violate Section 8(a)(5) by refusing to bargain with a union with respect to the terms and conditions of employment of striker replacements hired during a strike, where the union represented the strikers. *Detroit Newspaper Agency*, 327 NLRB 871 (1999). Therein, the Board identified the problem presented by the petition here:

[4] The Employer contends that, based on the Board's decisions in *O.E. Butterfield*, supra, and *Harter Equipment, Inc.*, 293 NLRB 647, 648 (1989), temporary striker replacements are prohibited from organizing. In those decisions, the Board determined that temporary employees were ineligible to vote in Board elections which involved a broader unit also encompassing permanent employees. The Board's rationale for excluding temporary employees as eligible voters was that they do not share a community of interest with permanent employees in the unit because their term of employment is finite. *Catholic Healthcare West Southern California*, 339 NLRB 127, 128 (2003). In the instant case, the proposed unit consists solely of temporary employees and community of interest vis-à-vis permanent employees is not a consideration. Thus, the Employer's reliance on these decisions is misplaced. The larger issue of whether a unit comprised of only temporary striker replacements would, under any circumstances, be appropriate has not been addressed directly by the Board. Because the petition here must be dismissed due to the Petitioner's conflict of interest, I need not reach that larger issue.

> [T]here is at least a reasonable concern that the union would not be a vigorous bargainer for the replacement employees because of the direct conflict of interest between the strikers and their replacements. These employees are the persons who have crossed the union's picket line during the union's economic battle with the employer.

Id. at 871-872. In addition, the Board noted the desire to avoid escalating industrial strife by injecting bargaining for replacement employees into an ongoing bargaining process attempting to agree on a successor contract for permanent employees. *Id*. at 871.

Although *Detroit News* did not involve a representation election, the Board's rationale is applicable here. If the Petitioner is permitted to proceed, it ultimately could end up as the exclusive collective bargaining representative of both permanent production and maintenance employees at The Levy Company in one bargaining unit, and temporary striker replacement loader operator employees at The Levy Company in a separate bargaining unit. That scenario raises a reasonable concern that the union would not be a vigorous bargainer for the replacement employees, who have crossed the picket line during a strike ongoing for over 7 months. The interests of the temporary striker replacements—in particular their desire to become permanent workers—would be at direct odds with the interests of the permanent employees, many of whom undoubtedly will want to return to work if and when the strike ends. Permitting the Petitioner to proceed to represent both groups of workers could lead to a situation where effective bargaining for each of the separate units would be impossible.[5]

The petitioned-for unit is made up of temporary striker replacements and the Petitioner represents the employees for whom the replacements are working. Under those circumstances, the petition cannot be permitted to proceed.[6]

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[5] In many legal situations, a conflict of interest can be waived by a party. Thus, an argument could be made that temporary employees, by voting in a representation election and choosing to be represented by the same union which represents permanent employees, have implicitly waived the conflict of interest which exists. However, the conflict of interest applies to both temporary employees and permanent employees. A union representing both might act to the detriment of permanent employees when the interests of the two groups clashed. The election does not provide a mechanism for permanent employees to waive the conflict of interest, because they are not voting in the election.

[6] Alternatively, the petition should be dismissed because the only appropriate bargaining unit is one that includes all Staff Source employees working at The Levy Company and the Petitioner stated at the hearing that it did not wish to proceed with the petition in such a unit. The petitioned-for unit of temporary loader operators is not appropriate.

Section 9(b) of the Act grants discretion to the Board to "decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof." 29 U.S.C. § 159(b). The Board's procedure for determining an appropriate unit is to first examine the petitioned-for unit. *See, e.g., The Boeing Co.*, 337 NLRB 152, 153 (2001); *Overnite Transportation Co.*, 331 NLRB 662, 663 (2000). If the petitioned-for unit is appropriate, then the inquiry ends; if the petitioned for unit is not appropriate, the Board may examine alternative units suggested by the parties or select an appropriate unit different from those proposals. *Id*. It is well settled that the unit need only be an appropriate unit, not the most appropriate unit. *Id.; see also Phoenix Resort Corp.*, 308 NLRB 826, 827 (1992). As a general matter, a carved-out unit is appropriate where employees in that unit have a separate community of interest from other job classifications; in determining this community of interest, the Board examines such factors as wages, benefits and other working conditions, commonality of

V. Right to Request Review

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street NW, Washington, DC 20005-3419. This request must be received by the Board in Washington by **April 5, 2006**

DATED at Chicago, Illinois this 22nd day of March, 2006.

Roberto G. Chavarry
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supervision, degree of skill and common functions, frequency of contact and interchange between employees, and degree of functional integration. *Boeing Co.*, 337 NLRB at 153.

In this case, the loader operators do not have a separate and distinct community of interest from other temporary employees working for The Levy Company. The record evidence demonstrates that the loader operators and the other job classifications have similar wages, benefits, and promotional opportunities (or lack thereof); loader operators frequently interact with the other job classifications; transfers of employees between the job classifications has occurred on multiple occasions; each job classification frequently must rely on or work with persons in other job classifications in order to complete their job duties; and the employees placed by Staff Source all must have skill and experience with heavy industrial equipment.